Supreme Court, U.S.
FILED

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No.

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In The

Supreme Court of the United States

October Term, 1995

NACHMAN BRACH, suing on his own behalf and as representative of a class of Satmar Hasidic Jews,

Petitioner,

vs.

CONGREGATION YETEV LEV D'SATMAR, INC.; HONORABLE FRANCIS D. PHILLIPS, II; COUNTY OF ORANGE NY; HONORABLE GAIL S. SHAFFER; HONORABLE ROBERT ABRAMS; AND HONORABLE MARK R. CHASSIN,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the State properly "take sides" between differing factions of the same religious sect, and in the process deny freedom of religious exercise and speech to the disfavored faction by arresting and prosecuting its members?

2. Does a religious membership corporation, as owner of a Cemetery which has opened its doors to the public at large, have the right to call on state police to arrest and prosecute an identified few individuals who have been ordered excluded because of their refusal to follow the direction of the religious leader of the Cemetery's owner in secular matters?

3. Does the United States Constitution or the civil rights laws provide a right to a citizen to enter a Cemetery and pray at the grave of a deceased relative if the public may enter for that same purpose, over objections of the Cemetery owner?

4. May the owner of a dedicated Cemetery exact support for its political goals by otherwise refusing access, in the name of the rights of private ownership of property, to those who would pray at the graves of their relatives and friends?

5. May an organization acquire ownership of title to a Cemetery with knowledge of the existence of a shrine within its perimeters to which thousands made and continue to make pilgrimage annually and then, together with its members, and with the assistance of the state police, prevent entry by those they consider "persona non grata"?

PARTIES TO THE PROCEEDINGS

The original parties to this case were Nachman Brach, suing on his own behalf and as representative of a class of Satmar Hasidic Jews ("Brach"), as the plaintiff, now petitioner, and Congregation Yetev Lev D'Satmar, Inc., a Religious Corporation organized under the laws of the State of New York, Honorable Francis D. Phillips, II, District Attorney of the County of Orange; The County of Orange, New York; Honorable Gail S. Shaffer, Honorable Robert Abrams, and Honorable Mark R. Chassin, constituting the Cemetery Board of the State of New York as defendants, now respondents.

There has been no change in the original parties.

Congregation Yetev Lev D'Satmar, Inc. has no subsidiaries, but is affiliated with other Congregations worldwide whose members follow the Satmar tradition of Hasidic Judaism.

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OPINIONS BELOW

Neither the Judgment nor the Opinion of the District Court has been officially reported. The Order and Judgment of Dismissal is attached as Appendix C hereto.

The Judgment of the Court of Appeals for the Second Circuit was rendered on May 30, 1995 and is noted without opinion at 57 F.2d 1064. A copy of the Order and Mandate is annexed as Appendix B.

A Petition for Rehearing or in reconsideration en banc was timely presented to the Second Circuit and denied by Order of the United States Court on Appeals on October 13, 1995; a copy of the Order is annexed as Appendix A.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals denying the Petition for Rehearing or for *en banc* consideration was issued October 13, 1995.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The verbatim text of Amendment XIV of the United States Constitution; 42 U.S.C. § 1983; 42 U.S.C. § 1985 and 42 U.S.C. § 1982 may be found in Appendix F.

STATEMENT OF THE CASE

A. Introduction

This is a quintessential civil rights action on which the United States constitutional guaranties of freedom of speech and freedom of religion also impact. The New York State Police and the Orange County District Attorney have confederated with respondent Congregation Yetev Lev D'Satmar, Inc. (hereafter "respondent Congregation" or "Congregation") to exclude petitioner Nachman Brach ("Brach") and approximately forty others, as well as their entire families, the putative Class (hereafter "plaintiffs" or "plaintiff Class"), all Satmar Jews, all former members of respondent Congregation, from entering a Cemetery owned by respondent Congregation by physical force, by promising arrest and prosecution, and by arresting and prosecuting them as "trespassers" if they enter the Cemetery for the purpose of offering prayer at the graves of the kin of members of the plaintiff Class, as well as the grave of late Grand Rabbi Joel Teitelbaum (hereafter "Grand Rabbi Joel"), whose grave is a recognized religious shrine.

The religious beliefs and devotional duties of the plaintiff Class require them to attend at the gravesites of their deceased kin and of Grand Rabbi Joel for the purposes of sepulcher and prayer, and they are being excluded because of political and not religious differences with the current Grand Satmar Rabbi, Moses Teitelbaum (hereafter "Grand Rabbi Moses").

The lower court, Honorable Charles P. Sifton, Jr., United States District Judge, has ruled on a pre-discovery motion of respondent Congregation under Fed. R. Civ. P. 12(b)(1) and (6) that petitioner's proposed Amended Complaint fails to set out a claim for relief, and that petitioner has no claim.

Previous thereto, the court denied, without taking any testimony, petitioner's two Preliminary Injunction Motions, seeking access to the graves on important religious days; denied the application of the wife of petitioner Nachman Brach for leave to intervene in order to visit the grave of her deceased father; and the lower court also denied the motion for class action certification.

This appeal brings up for review all of these rulings.

B. Detailed Discussion of the Facts

Respondent Congregation's membership is composed of that sect of Hasidic Jews known as "Satmar". Their devotion to their current religious leader, Grand Rabbi Moses, is such that most of the membership accepts and follows his positions on political and other secular matters in the same manner as those of a theological nature; and Grand Rabbi Moses himself fails to make any distinction.

The Cemetery, which is the central focus of this case, is located in the Village of Kiryas Joel in Orange County, New York, whose population consists almost entirely of Satmarer, as was found by the United States Supreme Court, *Grumet v. Board of Education of Kiryas Joel Village School District*, __ U.S. __, 114 S. Ct. 2481 (1994), affirming the New York Court of Appeals, *Grumet v. Board of Education of Kiryas Joel Village School District*, 81 N.Y. 2d 518, 601 N.Y.S. 2d 61, 618 N.E. 2d 94 (1993).

The Village of Kiryas Joel was created as a result of political agitation and pressure from Satmarer who resided in that section of the Town of Monroe, New York, which is now the Village of Kiryas Joel. The creation of the Village of Kiryas Joel ("place of Joel [Teitelbaum]") was the

culmination of the dream of the late Grand Rabbi Joel, founder of the Satmar sect, who wished for his flock to be organized as an insular community where they could follow their distinctive customs and tradition of dress, diet, personal habits, religious observance, etc.

The Village today is an insular island of its own making and design consisting of 320 acres inhabited by Satmarers.

Since the Villagers are part of the flock of the current Grand Rabbi Moses, and since they follow his teachings in matters political as well as divine, the current Grand Rabbi directs, and through his "palace guard", runs the Village, selects its officials, directs what Village laws shall exist and who shall run for public office. For example, in June 1989, Grand Rabbi Moses decreed a "tax" in his pretended and purported capacity as director of both divine and secular law, obliging anyone who erects a new residence in the Village to pay $10,000 to the respondent Congregation. Leopold Lefkowitz, the puppet Mayor of Grand Rabbi Moses, who is the only Mayor the Village of Kiryas Joel has ever had, promptly and dutifully approved it. Lefkowitz has also for many years been President and Trustee of the respondent Congregation and President and a director of the United Talmudic Academy, the educational arm of the respondent Congregation. Prior to 1992, the New York Legislature, ever solicitous of the wishes of the Satmarer, created a special school district whose boundaries were identical to those of the Village, admittedly in order to accommodate, in publicly funded facilities, disabled Satmarer children, whose attendance at the Congregation's Hasidic Satmar Schools run by the United Talmudic Academy, a corporate affiliate of the Congregation, was impractical.[1] The creation of this public

1. Both the New York Court of Appeals and the United States Supreme Court subsequently declared the law unconstitutional.

school district occasioned the need for the public election of school board members. Grand Rabbi Moses, of course, selected his slate, but one Waldman, a Satmarer and a Villager, decided to run as an independent. Although obtaining a significant number of votes, his candidacy was defeated. Retribution for running against the Rabbi's slate was swift and cruel: Waldman was expelled from the Congregation and his five children were expelled from United Talmudic Academy Schools. Those Villagers who were sympathetic to Waldman (so-called "nonconformists"), as well as others who have had political, or at least non-religious differences with Grand Rabbi Moses, including petitioner Brach, have all been similarly expelled. They are the plaintiff Class. It bears mentioning, however, that none of those expelled seek reinstatement either through this lawsuit or otherwise; they simply seek access to the Cemetery.

Expulsion means the denial of access to the Cemetery at Kiryas Joel which is owned by the respondent Congregation only since 1988. Petitioner Brach, his wife and others comprising the group of expelled members (the putative Class here) have kin buried within the Cemetery grounds. Their religious beliefs and devotion require them to attend several times annually at the graves of their kin, all buried before their "expulsion".

In fact, the death and burial within the Cemetery of the next of kin of some of the group antedates the acquisition of title to the Cemetery property by the respondent Congregation in 1988.

One such person buried within the Cemetery prior to the Congregation's acquisition of title was Grand Rabbi Joel the founder of the Satmar sect, universally respected and revered leader of Satmar Hasidim throughout the world. Under his

leadership and tutelage, thousands throughout the world became Satmar followers. Since his death and burial within the Cemetery in 1979, tens of thousands annually from the four corners of the globe, have attended at his gravesite within the Cemetery on the anniversary of his death.

In 1988, the Cemetery property, title to which theretofore stood in the name of another Satmar Congregation, separately organized under New York's Religious Corporation Law[2] was conveyed pursuant to court order to the respondent Congregation. One of the stated reasons was that the predecessor owner could not accommodate the huge crowds of tens of thousands who made a "pilgrimage" to Grand Rabbi Joel's grave annually. As previously stated, these huge crowds continue to date to make their annual pilgrimage to pay homage and to pray at the grave of Grand Rabbi Joel within the Cemetery grounds. The Congregation told the lower court that it expected 25,000 to 30,000 people to visit Grand Rabbi Joel's grave in 1994.

Only the putative Class of about forty individuals and their families, including their children and grandchildren, are denied entry. State patrolmen attend at the gates to the Cemetery. They have arrested, and the Orange County District Attorney has prosecuted, members of the Class whose only wish is to attend at the burial on the death of their kin, at the graves of their deceased kin, and at the grave of Grand Rabbi Joel, together with the rest of the Satmar sect worldwide.

The state police and Orange County District Attorney's Office have taken their respective positions because the

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2. While respondent Congregation asserted that the grantor of title was a "subsidiary", a Religious Corporation is composed of its members and it therefore can have no subsidiaries.

respondent Congregation claims the "right" to exclude "persona non grata" from the Congregation's "private property", the Cemetery.[3] They are "persona non grata" because of non-religious differences with the Grand Rabbi.

The lower court agreed that no constitutional right, or civil rights legislation, protects the petitioner and the plaintiff Class because the Cemetery is "private" and that the Congregation, the State Police and the Orange County District Attorney have all acted with perfect propriety. The lower court, therefore, denied petitioner's two applications for injunctive relief, and dismissed the Complaint on the Motion under Fed. R. Civ. P. 12(b)(1) and (6).

It should be noted that even the entrance to the Cemetery marks the place as public, rather than private. While, as both the New York Court of Appeals and the Supreme Court found in *Grumet v. Board of Education, supra*, Yiddish is the principal language in the Village of Kiryas Joel, where the Cemetery is located, and that Satmarer follow a distinctive dress code, the signs at the Cemetery entrance are in the English language and the Satmarer dress code, to be followed by all who enter, is likewise set out in English. However, English is not the primary tongue of Satmarer, and certainly not in Kiryas Joel.

From the foregoing, it is plain that petitioner and the putative Class are excluded from the Cemetery for reasons arising from personal animosity which relate to the decision of the putative Class not to "conform" with the directives and teachings of Grand Rabbi Moses in political or educational as

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3. The characterization of petitioner and the putative Class as "persona non grata" is a direct quotation from the Congregation's counsel at oral argument on its Motion to Dismiss before Judge Sifton (A.125). (Numbers in parentheses preceded by "A" refer to the Joint Appendix in the United States Court of Appeals for the Second Circuit.)

distinguished from theological matters. The factual finding by the lower court of disturbances at the Cemetery, on a pleading motion to dismiss the Complaint for legal insufficiency, without benefit of testimony, is wholly unwarranted. Moreover, the occurrence of "disturbances" without more would in no event justify total exclusion of the entire plaintiff Class from the graves of their kin. Finally, any disturbance would have initially occurred from the physical exclusion of members of the putative Class.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

Petitioner's constitutional claims are substantial and important and the views expressed in this case by the lower courts in rejecting them are of universal significance.

This case involves a most egregious violation of the constitutional rights of the petitioner (and the putative group in this case), let alone a violation of his rights under the federal civil rights laws. This Court is earnestly beseeched to invoke its power of review concerning the willingness of a United States district judge to sanction the New York state troopers in carting off to jail, and concerning the willingness of the Orange County District Attorney to prosecute, people whose "crime" is to wish to pray at the graves of a deceased mother, father, spouse, child, etc., in accordance with the religious beliefs and religious ritual of the "criminals" (*see* Appendix E, the letter from the American Jewish Congress joining in the request for the issuance of a Writ of Certiorari).

This Court is respectfully reminded that District Judge Sifton threw out the petitioner's case at the pleading stage and

that the Second Circuit affirmed that disposition without opinion. Men and women of every religious persuasion, and those without religious persuasion as well, have been visiting graves and offering prayer at graves of the dear deceased since the dawn of civilization. No counsel for any party has identified any case ever decided by any court before this one where the owner of a dedicated Cemetery has ever attempted, let alone succeeded, in barring or conditioning the right of mourners to offer prayers at the graves of the departed. Counsel for the petitioner confidently suggest to this Honorable Court that most people would consider as unthinkable the notion that because title to the ground of a dedicated Cemetery is "privately" owned, a visit to the grave of a beloved next of kin could be barred on that ground and could subject the putative visitor to a jail term.

This Court should not allow the precedent set by the courts below to stand.

It is perhaps fortuitous that the petitioner in this case seeks access to the Cemetery out of religious conviction, because denial of his right of exercise of that religious conviction involves the denial of a constitutional right. In *Satiacum v. Laird*, 475 F.2d 320 (D.C. Cir. 1972), the court held that the denial of a right to participate in memorial religious services inside a Cemetery is the denial of a constitutional right. It is true that in *Satiacum, supra*, the Cemetery was owned by the United States Government, but the constitutional right to offer gravesite prayer is obviously not dependent upon the character of the owner of the ground within which the decedent is buried. Other courts have also held that the free exercise of religion is of the highest order of constitutional right.

Similarly, petitioner's claims under 42 U.S.C. § 1983 were improperly dismissed.

(a) A Cemetery is not "private property" in the same way as a dwelling or farm because the next of kin have visited the graves of their loved ones since the dawn of civilization (and the plaintiff Class has done so in this very Cemetery since the death of their next of kin). Accordingly, a party who permits his lands to be customarily used as a Cemetery (or, as in the case of respondent Congregation, a party who acquires such lands) has no right to exclude the next of kin who seek access for the purposes of sepulcher. Consequently, the owner of such property may not invoke the powers of law enforcement authorities to enforce such an unlawful purpose of excluding supplicants (and even less may law enforcement authorities respond by arresting and prosecuting those who enter the Cemetery under the supposed "private property" rubric of the Congregation).

(b) The constitutional right of the petitioner and the Class to offer prayer and sepulcher in a Cemetery at the graves of their next of kin and at a religious shrine takes precedence over the respondent Congregation's alleged "private property" rights.

(c) The state's favoring of one religious faction over another is an accommodation prohibited by the United States Constitution.

(d) The respondent Congregation and the Village of Kiryas Joel are so intertwined that they are the same and should be treated as such in non-theological matters. The history of the Satmarer at Kiryas Joel is such that the petitioner should have the opportunity to at least develop this identity of relationship.

These arguments are hereafter discussed *seriatum*.

A. A Cemetery Is Not "Private Property" in the Same Way as a Dwelling or a Farm, Especially So Where the Grave of One Buried Within Its Boundaries Is a Religious Shrine. The Next of Kin of Those Buried Cannot Be Excluded from Paying their Respects to the Dead.

The lower court discussed and disposed of petitioner's Section 1983 claims of illicit state action by finding that the Cemetery was "private property"; that since the Cemetery was "private property" the respondent Congregation had the right to exclude "trespassers" or those it regards as "persona non grata" from entering and, accordingly, it had the right to call the state troopers to protect its "private property" from trespassers.

It therefore follows that if the respondent Congregation's ownership of the Cemetery does not carry with it the same "bundle of rights" which the ownership of other classes of private property carries, the lower court's analysis is fundamentally flawed.

Even though title to a Cemetery may be privately held, it is, by its nature, altogether different from other classes of property. Burial sites have been marked with headstones throughout history in order, among other things, to allow mourners and other visitors to find the burial sites. The owner of land on which human remains are buried in marked graves must be deemed to have accepted those remains for burial with the knowledge and consent that the decedent's next of kin and survivors will come from time to time to pay their respects.

Courts and commentators alike are unanimous that access to marked graves by those who would visit or pay respects to

the dead may not be foreclosed by the argument that a cemetery is "private property". *Sandoz v. A M I, Inc. (In re Provident General Corp.)*, 33 B.R. 241 (Bkrtcy. W.D. Louisiana, 1983); *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. S.D. 1969); *Smith and Gaston Funeral Directors Inc. v. Dean*, 262 Ala. 600, 80 So. 2d 227 (1955); 14 Am. Jur. 2d, *Cemeteries*, Section 2 (1964); *A. F. Hutchison Land Company v. Whitehead Brothers Co.*, 217 N.Y.S. 413, 127 Misc. 558 (Sup. Ct. 1926).

The reason cemeteries are different from other classes of property, even if "privately owned", is apparent: if the concept of "private property" were given primacy, the owners of cemeteries could in effect hold the remains of decedents there interred for ransom. Such an abuse of the concept of private property would be intolerable in any civilized society; it would constitute a fraud on the next of kin and, depending upon whether there is a "hereafter" or one's view of it, would constitute a "fraud on the dead." (*Bianco v. Pagano*, Superior Ct., Bergen Co., N.J., N.Y. Times November 11, 1994, page B5).

It is especially intolerable in the case of these plaintiffs, for this Cemetery, which existed as a burial ground for Satmar Jews living in the vicinity long before the Congregation acquired title in 1988 and is the resting place for the remains of ancestors of the named petitioner and the putative Class as well as the resting place for Grand Rabbi Joel Teitelbaum, whose grave, as above indicated, is regarded as a shrine by tens of thousands who make a pilgrimage annually to the shrine.

Especially because the ground was already a cemetery when the Congregation acquired title, the Congregation cannot divest the public whose ancestors were previously

buried there of their right of visitation. As for those members of the Class whose ancestors were buried subsequent to the acquisition of title by the Congregation, the Congregation's reliance upon the fact that it does not actually "sell" plots is exaggerated and the distinction not entitled to any weight. For one thing, there are numerous instances in the law in which the fact that a "sale" has taken place is not dependent upon the finding that there is a transfer of consideration, *see, e.g., N.Y. Penal Code*, Section 220.001.1. Whether the graves the named petitioner and members of the putative Class would visit were "purchased" before or after the Congregation acquired the property, and even if there never was a "sale" of a plot, the public whose ancestors are buried there certainly have a common law as well as a statutory right of access:

> The privilege or license incident to sepulcher, in the absence of express restriction, includes more than the mere naked rhyme of depositing dead bodies in the ground, for with it is included the right to interment according to the usual custom and also the right of the living to express their affection and respect for the dead by visitation and ornamentation of the place of burial.

Hutchinson Land Co., supra, 217 N.Y.S. at 417. *See also, Birdline v. Moreland*, 579 F. Supp. 412 (N.D. Georgia, 1983) (assuming without finding that plaintiffs, descendants of people whose remains were buried in the Cemetery, had property interests in the form of "burial easement" cognizable under the due process and just compensation clauses of the Fourteenth Amendment of the United States Constitution); *Terry, supra*, 307 F. Supp. 369 (holding that privately owned Cemetery was "public" within the meaning of title 42 U.S.C.

§ 1982, and declaring that Cemetery could not refuse burial on the basis of race); *New York Not-For-Profit Corporation Law*, Section 1510 and Section 44-(a)(2) of the New York Civil Rights Law (both of which prohibits cemeteries from denying access to burial plots); *New York Religious Corporation Law*, Section 8 (title to burial plots and cemeteries owned by religious corporations "shall upon the decease of a proprietor of such lot — descend to his heirs-at-law or devisees . . ."). *See also, Warschauer Support Society v. State of New York*, 754 F. Supp. 305 (E.D.N.Y. 1991) (noting that the sale and disposition of cemetery property is a matter of strong public concern in New York and subject to the state's police power). *See also, State of Kansas ex rel. Stephan v. Lane*, 228 Kan. 379, 614 P.2d 987 (1980), quoting with approval from *Cemetery Associates v. Meninger*:

> A Cemetery is as public a place as a Courthouse or a market. It may not be frequented as much but visits to it are necessary and as certain . . . We may keep away from the Courthouse and avoid the market, but the place of the dead none may shun.

In addition to the fact that cemeteries are considered public property by all of the cases and authorities, at least to the extent that next of kin may visit and pay their respects to the dead, it is much too late in the day to argue that the fact of private ownership divests the public of the right of access to property when it is held out for public use. In *Marsh v. Alabama*, 326 U.S. 501, 506, 66 S. Ct. 276, 278, 90 L. Ed. 2d 265, 268 (1946), the Supreme Court held that property that is private only in the nominal sense is public as far as the First Amendment rights of those who would come upon it are concerned:

> We do not agree that the Corporation's property interests settle the question. The State urges in effect that the Corporation's right to control the inhabitants of Chickasaw is co-extensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the Statutory and Constitutional rights of those who use it.
>
> When the public enjoys a broad license to utilize a certain property, that property, though privately held, is a quasi-public forum within the meaning of the First Amendment.

See also, Crist v. Village of Larchmont, 797 F. Supp. 312 (S.D.N.Y. 1992).

In the wake of *Marsh, supra*, the rule has thus developed that owners of private property held out to the public for any purpose may proscribe the public's First Amendment rights on that property *only if* the proscription is non-discriminatory and the proposed First Amendment activity is unrelated to the operations of the property in question. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972) (no First Amendment violation where shopping center had strict policy, uniformly applied, prohibiting hand billing as incompatible with the shopping center's essential purpose, especially since other avenues of communication were available)."[4]

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4. The lower court's suggestion at p. 17a of Appendix D, *infra*, that (Cont'd)

Thus, even admittedly private property may function as public for certain purposes. When it does, the Constitution prohibits the owner from selectively refusing access in violation of the First Amendment if access is sought for a purpose not incompatible with the use of the property at the time in question. *Crist, supra; People v. Leonard*, 62 N.Y. 2d 404, 408, 477 N.Y.S. 2d 111, 114, 465 N.E. 2d 831 (1984) (whether the property is publicly held or privately held, if it is open to the public at a particular time, any member of the public enjoys at least a license or privilege to enter).

In addition to the fact that cemeteries are generally considered "public" property, it should be borne in mind that the relevant public in this case are followers from throughout the world of the Satmar Hasidic tradition who make a pilgrimage numbering tens of thousands annually to enter the Cemetery and to pray at the grave of Grand Rabbi Joel and whose rights in that regard are not questioned. Moreover, the appearance and operation of this Cemetery are consistent with and indeed support the conception of public property and a public right of access. Signs in English at the entrance to the Cemetery remind visitors to wear proper dress; these signs are for the benefit of members of the general public since the Congregation's members — the general public of Kiryas Joel — speak Yiddish and always observe a dress code. *Grumet, supra*. Upon these facts, it may be inferred that the Cemetery, while privately owned, is ordinarily open to the general

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(Cont'd)

Plaintiffs fail to address the implications" of *Lloyd Corp. v. Tanner, supra*, is incorrect since it was discussed at page 12 of petitioner's memorandum in support of its motion for leave to serve and file an amended complaint. The lower court either overlooked the discussion or chose to ignore it. In either event, *Lloyd Corp. v. Tanner* supports, rather than undermines, petitioner's case here precisely because of the factors which distinguished it from *Marsh v. Alabama, supra. See* Discussion, *infra*, pages 18-19.

public; these plaintiffs, whose next of kin are buried in the Cemetery and whose religious principles dictate that they visit the gravesites, obviously enjoy as much, if not more license to enter for these purposes than any member of the general public who may not have any reason beyond passing curiosity to enter the Cemetery.

The existence of a religious shrine on the Cemetery grounds (the grave of the late Grand Rabbi Joel Teitelbaum) is another reason why the "private property" rubric of the respondent Congregation must be rejected. Numerous cases support the view that access to a religious shrine is a constitutionally-guaranteed right of the highest order which may not be lightly cast aside. In *Pillar of Fire v. Denver Urban Renewal Authority*, 509 P.2d 1250 (Sup. Ct. Colo. 1973), the Denver Urban Renewal Authority filed a petition to condemn a church building as part of an urban renewal program, which the petitioner Church Pillar of Fire claimed to have religious significance independent of its existence as a building. The court was persuaded that the importance of the building as a religious shrine necessitated a hearing to determine whether the urban renewal project could proceed without destroying the religious shrine.

Because cemeteries in general, and this Cemetery (the site of a religious shrine visited by tens of thousands annually) in particular is "private" in only a literal sense, the next of kin wishing to attend a burial or visit their dead or attend at the shrine are not "trespassers"; and the state troopers, acting at the behest of the respondent Congregation and the Orange County District Attorney, acting under similar "complaint" of the respondent Congregation are engaged in a continuing civil rights violation by depriving access to the plaintiff Class to the graves they seek to visit. This case is altogether different from those cited by the District Court to support the obvious

proposition that citizens may call the police to deal with trespassers or others suspected of illegal conduct. Here, however, there is no predicate act of illegality or even a color of illegality in the conduct of the plaintiff Class which could justify the arrest and prosecution, of any member of the Class.

For this reason, the conduct of state law enforcement authorities in causing arrests and prosecution for conduct they know or should know is not criminal in character gives rise to a claim under 42 U.S.C. § 1983. Moreover, it gives rise to a similar claim against the private citizens whose conduct sets in motion the offending state action, *i.e.*, where a party sets out to cause the arrest and prosecution of another to prevent or deter the arrestee for conduct which is not criminal, and state action occurs, although with prior notice to the state to justify inquiry as to whether a crime has in fact been committed or threatened, an actionable Civil Rights violation has occurred. *Taylor v. Gilmartin*, 686 F.2d 1346 (C.A. 10, 1982); *Wagenmann v. Adams*, 829 F.2d 196 (C.A. 1, 1987); *Motes v. Myers*, 810 F.2d 1055 (C.A. 11, 1987); *Hernandez v. Schwegmann Brothers*, 673 F.2d 771 (C.A. 5, 1982).

Upon such facts, both the state and the complainant are answerable. *Adikes v. Kress Co.*, 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).

B. The Constitutionally-Guaranteed Rights of Free Speech and Freedom of Religion Must Take Precedence Over the Respondent Congregation's "Private Property" Claims.

The plain meaning of *Marsh v. State of Alabama, supra*, is that the rights of owners of private property must yield to the right of freedom of speech and freedom of religion guaranteed by the United States Constitution when the two conflict. *Lloyd*

Corp. v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), cited by the lower court, may be read as the high-water mark for any restrictions on the right to free speech on private property; and the teaching of *Lloyd* applies *only if* (i) the exercise of the right of free speech interferes with the business of the owner; and (ii) the limitations on that right are uniformly applied by the owner; and (iii) other avenues of communication are available. Finally, *Lloyd* was not a "free exercise of religion" case.

Lloyd Corp.'s qualifications on the broad teaching of *Marsh, supra*, are altogether relevant here. First, the hand bills which the plaintiff in *Lloyd Corp., supra*, wished to distribute in a shopping mall could as well have been distributed in any shopping mall; here, the graves at which the putative Class wish to pray are within this Cemetery and nowhere else on the face of the planet. Second, the business of a cemetery is to provide a place for burial of the dead as well as for those who wish to visit the graves; and visitation of the graves by the plaintiff Class is not claimed by the Congregation to be an interference with the conduct of Cemetery business; and thirdly, the "off-limits" restrictions against plaintiff Class are not uniformly applied: To the contrary, except for the plaintiff Class, the public is free to enter, and as above stated, tens of thousands make the pilgrimage annually to the grave of Grand Rabbi Joel Teitelbaum.

Finally, and perhaps most important of all, *Lloyd Corp. v. Tanner* did not involve the exercise or attempted exercise of the right of freedom of religion as in *Marsh v. Alabama, supra*. The action of the state troopers in arresting or threatening arrest and of the District Attorney in prosecuting or threatening prosecution of the next of kin who wish to pray at the graves of deceased relatives places the State in a position of affirmatively preventing the exercise of a constitutional right guaranteed to each member of the putative Class.

> The First Amendment prohibits governmental actions that burden an individual's free exercise of religion unless those actions are necessary to fulfill a governmental interest of the highest order that cannot be met in a less restrictive manner.

(*Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688 (C.A. 9, 1986), *rev'd, Lyng v. North Indian Cemetery Protective Association*, 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1987).

C. The State's Favoring of One Religious Faction Over Another Is an Accommodation Prohibited by the United States Constitution.

The lower court correctly found that "the source of [plaintiff's] expulsion is their refusal to accept the authority of the present Congregation Rebbe. Accordingly, this is an internal dispute between members of the sect and nothing more."

That this case arises from "an internal dispute between members of a [religious] sect" is quite true, but it has become much more, and for the most part, because the State has made it so. The State has taken sides, and come to the aid of one faction in its struggle against the other. Worse yet, by refusing to direct termination of arrests and prosecution of the putative Class, the District Court has in effect added its own imprimatur to the manner in which the present Grand Rabbi has resolved this factional dispute arising from his exercise of political power.

This case does not directly concern itself with educational

matters, although it arises from differences about educational matters. However, the Supreme Court and other courts have held in the context of public education cases that the appearance of partiality favoring one religious group or sect is constitutionally impermissible, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); *Grumet, supra.* The same principle should apply to the acts of the state troopers and public prosecutor coming to the aid of a religious group which owns a Cemetery to exclude another faction from a constitutional right of prayer, even if the differences between the two factions are theological in origin. *A fortiori*, this rule should apply where, as here, the differences between the two factions are political. In effect, the current Grand Rabbi tells the police what he requires to keep his flock in tow, impermissible under the teaching of *Larkin v. Grendel's Den*, 459 U.S. 116, 103 S. Ct. 503, 74 L. Ed. 2d 297 (1982).

D. The Intertwining of the Government of Respondent Congregation with the Government of the Village of Kiryas Joel Makes the Congregation's Actions State Actions.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), the Supreme Court found state action from the acts of racial discrimination by a restaurant which leased space in a public parking facility. Had the lower court in this case not dismissed petitioner's Complaint prior to any discovery, discovery would have established, amongst other things, that "election" to public office within the Village, such as elections to the School board, are held within the Synagogue building and that Village-owned vehicles are routinely used on Congregational business. Satmar Jews are most orthodox, disciplined, and fervently devoted to the performance of their manifold religious rituals. The Village of Kiryas Joel is populated

entirely, or at least almost entirely so, by Satmar Jews who "conform" and their Grand Rabbi is surely the leader to whose wishes they "conform". For the Satmarer, the line between the spiritual and the political views of their Grand Rabbi is, to say the least, not clearly marked. Without benefit of discovery, plaintiffs can tell the Court that the current Grand Rabbi acted on his own initiative on June 1, 1989 in decreeing a "tax" of $10,000 to be paid to respondent Congregation by every new builder of an apartment within the Village "binding on everyone either by the laws of Torah and also in secular law without any exceptions." There has been no dissent.

Similarly, Joseph Waldman was expelled from the Congregation and his children expelled from Satmarer schools for running as an "independent" for the New York State School Board of Kiryas Joel. Finally, the state police and the District Attorney of Orange County are acting to prevent worshippers from entering what is for all practical purposes a public Cemetery whose gates are open to the entire world — except "persona non grata" like petitioner Brach and Waldman.

Plaintiffs recognize that their claims to the existence of a "symbiotic relationship" among the Congregation, the United Talmudic Association and the Village of Kiryas Joel does not find support in the cases heretofore decided. However, plaintiffs respectfully suggest that, at least at this point, and despite the denial of any discovery to date, the known facts suggest a relationship so close between (a) the Village (an arm of government) on the one hand, and (b) the current Grand Rabbi and his palace guard (fervently supported by "conforming" Villagers, all Satmarer) on the other, as to be substantially identical. If this is so, the closing of the Cemetery to plaintiffs may be an act of the Village government itself.

Grumet, supra, is not to the contrary. The United States Supreme Court there declared the legislative creation of the Kiryas Joel School Board as an unconstitutional "establishment of religion." It distinguished this legislative act from events giving rise to the creation of the Village itself, which occurred from the granting of a Village charter under a neutral Village law. The Supreme Court did not explore the consequences of where, as plaintiffs claim here, a religious organization runs the Village. Count I of the proposed Amended Complaint states a claim which this Court should direct to trial.

II.

PLAINTIFFS' CLAIMS UNDER 42 U.S.C. § 1985 ARE ALSO MORE THAN LEGALLY SUFFICIENT.

The lower court's discussion of why plaintiffs' claims are insufficient under 42 U.S.C. § 1985(3) shows that it missed the point entirely. As recently as *Bray v. Alexandria Women's Health Clinic*, __ U.S. __, 113 S. Ct. 753 (1991), the Supreme Court pointed out that Section 1985(3) reaches private conspiracies which may be altogether unrelated to religious matters, although, of course, conspiracies based on religious discrimination are included within the reach of Section 1985(3). *Jews for Jesus v. Jewish Community Relations Counsel of New York*, 986 F.2d 286 (C.A. 2, 1992). What is required to state a case under Section 1985(3) is "some racial or perhaps otherwise class-based animus behind the conspirators' action" *Colomrito v. Kelly*, 764 F.2d 122 (C.A. 2, 1985); *see also, Griffin v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 333 (1971) to deprive "any person or class of persons of the equal protection of the laws or of the equal privileges or immunities under the laws." 42 U.S.C. § 1985(3).

As the record makes abundantly clear, plaintiffs' expulsion from the cemetery grounds has its origins in political differences with the Grand Rabbi and his palace guard. The plaintiff Class are thus victimized by the respondent Congregation not *because they are Jews but in spite of it*. They are a class of Satmar Jews to themselves; unlike other Satmar Jews in the Village of Kiryas Joel, they are unwilling to accept the decrees and directions of the Grand Rabbi in political matters. They are thus a class victimized by being deprived of their civil rights (the right to go to the Cemetery for purposes of prayer). The lower court correctly concluded that "this is an internal dispute between members of a sect." That, however, hardly ends the inquiry, for there is nothing to suggest that such a dispute is excluded from the reach of Section 1985(3), if it results in a prohibited conspiracy.

Because of the lower court's understanding of Section 1985(3), it failed to consider whether plaintiffs' exclusion from the Cemetery to pray at the graves of their next of kin and at the grave of Grand Rabbi Joel Teitelbaum deprived them of "the equal protection of the laws or the equal privileges and immunities under the laws."

III.

THE LOWER COURT ERRONEOUSLY DISMISSED PLAINTIFFS' CLAIMS UNDER 42 U.S.C. § 1982.

In *Le Blanc-Sternberg v. Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991), Judge Goettel ruled, based on *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 91 L. Ed. 2d 594, 107 S. Ct. 1219 (1987) that certain Orthodox Jews stated a claim under 42 U.S.C. § 1982 for alleged deprivation of property rights "based on plaintiffs' [orthodox religious] lifestyle as

dictated by the tenets of plaintiffs' religion." Judge Goettel carefully identified the plaintiff Class as "orthodox Jews" as opposed to other classes of Jews.

Shaare Tefila, supra, as well as *Jews for Jesus, supra*, focuses on the victim of the wrong under Section 1982 and not the perpetrator thereof. Moreover, nothing in the language of Section 1982 suggests that merely because the characteristics of the perpetrator and victim are similar (or even identical), the perpetrator of the prohibited discrimination is immune from liability.

In any event, since it is undisputed even by the lower court that Section 1982 prohibits discrimination based upon distinctive ethnicity, it should be sufficient to point out that plaintiffs, Satmar Jews, have distinctively ethnic characteristics which sets them apart from all other groups including other Satmarer because while they follow the Satmar teaching and the authority of the Grand Rabbi in theological matters, they alone reject the teaching of the Grand Rabbi in other matters, particularly political matters. The word "ethnic" is defined as "a member of a minority group who retains the custom, language or *social views of his group*." (Webster's Ninth New Collegiate Dictionary — Merriman Webster — 1987) (Emphasis added.) In *Shaare Tefila Congregation v. Cobb, supra*, the Court stated that Section 1982 was "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or *ethnic characteristics*." (Emphasis added).

As to plaintiffs' property rights, there can be no question that there is a quasi-right of property of a dead body in the next of kin. *Diebler v. American Radiator and Standard Sanitary Corp.*, 196 Misc. 618, 92 N.Y.S. 2d 356 (Sup. Ct. Erie Co.,

1949); *Rotondo v. Reeves*, 153 Misc. 2d 769, 583 N.Y.S. 2d 739, *aff'd*, 596 N.Y.S. 2d 272.

In *Rotondo*, an award of damages for $1,500,000 was reduced to $250,000 for depriving the plaintiff of a right to furnish a proper burial for her son. *See also, Fuller v. Marx*, 724 F.2d 717 (C.A. 8, 1983); *Arnaud v. Odom*, 870 F.2d 304 (C.A. 5, 1989).

None of the cases cited and no cases which counsel for the petitioner have found identify the time when, if ever, this quasi-right of property enjoyed by the next of kin of access to a dead body terminates. It is proper to conclude that this quasi-right of property, consisting of access to the body of a deceased person continues until such time as it is proper to destroy an entire Cemetery.

For the purposes of this case, however, it is plain that the denial of access to the grave of a deceased person to his next of kin is an interference with a right of property prohibited by 42 U.S.C. § 1982.

There are additional considerations. It is nowhere suggested that the wishes of the dead should be ignored in terms of the distribution of their property; in fact, courts everywhere are busy every day in carrying out the wishes of testators as set forth in their wills. It is fair to suggest that at least some people hope that following death, their next of kin will pay respects at the grave from time to time. This is surely the expectation of every Satmar Jew. A part of his religion, ritual and devotion includes prayer at the grave of a deceased kin; and it is fair to assume he expects that his kin will follow his practice after his death. In this view, the acts of the respondent Congregation, the State Police and the Orange County District Attorney all operate in such fashion as to

practice "a fraud on the dead" buried within the Cemetery now owned by the respondent Congregation.

CONCLUSION

The Complaint should be reinstated, an injunction *pendente lite* granted, and the parties directed to proceed to trial in expeditious fashion.

Respectfully submitted,

NOEL W. HAUSER
Counsel of Record
NOEL W. HAUSER
AND ASSOCIATES
Attorneys for Petitioner

APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 13, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE II
CLERK

EDNY
93-cv-4606
Weinstein

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in one thousand nine hundred and ninety-five.

Dkt No: 94-7971

Brach

Plaintiff-Appellant,

v

Congregation Yetev

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Nachman Brach.

Appendix A

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
GEORGE LANGE III, CLERK
s/ Arthur M. Heller **10/13/95**
By: Arthur M. Heller **Date**
Administrative Attorney

APPENDIX B — ORDER AND MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MAY 30, 1995

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of May one thousand nine hundred and ninety-five.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE GUIDO CALABRESI,

HONORABLE JOSÉ A. CABRANES,

Circuit Judges.

No. 94-7971

NACHMAN BRACH, suing in his own behalf and as representative of a class of Satmar Hasidic Jews,

Plaintiff-Appellant,

-v.-

CONGREGATION YETEV LEV D'SATMAR, INC, HONORABLE FRANCIS D. PHILLIPS, II, COUNTY OF ORANGE NY, HONORABLE GAIL S. SHAFFER, HONORABLE ROBERT ABRAMS, and HONORABLE MARK R. CHASSIN,

Defendants-Appellees.

Appendix B

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Chief Judge Sifton's Memorandum and Order dated September 9, 1994.

s/ Amalya L. Kearse
AMALYA L. KEARSE,
U.S.C.J.

s/ Guido Calabresi
GUIDO CALABRESI, U.S.C.J.

s/ José A. Cabranes
JOSÉ A. CABRANES,
U.S.C.J.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED SEPTEMBER 15, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-93-4606 (CPS)

NACHMAN BRACH, etc.,

Plaintiffs,

-against-

CONGREGATION YETEV LEV D'SATMAR, INC., et alia,

Defendants.

JUDGMENT

A memorandum and order of Honorable Charles P. Sifton, United States District Judge, having been filed on September 14, 1994, granting the Congregation's motion to dismiss the original § 1982 claim, and the motion to deny plaintiffs' leave to file an amended complaint setting forth §§ 1985 and 1983 claims; dismissing plaintiffs' claim under 42 U.S.C. § 1982 and the pendant state law claim pursuant to the New York State Constitution; denying both parties' cross-motions for sanctions; and denying as moot the plaintiffs' motion for class certification, it is

ORDERED and ADJUDGED that plaintiffs take nothing of the defendants; that the Congregation's motion to dismiss the original § 1982 claim is granted; that the Congregation's motion

to deny plaintiffs' leave to file an amended complaint is granted; that both parties' cross-motions for sanctions are denied; that plaintiffs' claim under 42 U.S.C. § 1982 and the pendant state law claim pursuant to the New York State Constitution are denied; and, that plaintiffs' motion for class certification is denied as moot.

Dated: Brooklyn, New York
September 15, 1994

s/ Robert C. Heinemann
Robert C. Heinemann
Clerk of Court

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 9, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-93-4606 (CPS)

Nachman Brach, *etc.*,

Plaintiffs,

- against-

Congregation Yetev Lev D'Satmar, Inc. *et alia*,

Defendants.

MEMORANDUM AND ORDER

SIFTON, District Judge

This case involves a civil rights action originally brought pursuant to 42 U.S.C. §1982 by a splinter group of the Satmar Hasidim to enforce their alleged right to enter and pray at a cemetery owned by defendant, the Satmar Congregation (the "Congregation"). Plaintiffs have also sued a number of local and state officials for assisting in the alleged violation of the group's civil rights. The Congregation originally moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief may be granted and Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, as well as for costs and sanctions. Rather than dismissing the action against the Congregation on the return date, however, this Court ordered the

Appendix D

Congregation to show cause why plaintiffs should not be given leave to amend their complaint to add additional claims pursuant to 42 U.S.C. §§1983 and 1985, and asked plaintiffs to circulate a proposed amended complaint. Plaintiffs have now also moved for sanctions and class certification. For the reasons set forth below, the Congregation's motion to dismiss the original §1982 claim is granted, as is its motion to deny plaintiffs leave to file the proposed amended complaint setting forth the §§1985 and 1983 claims. The parties' cross-motions for sanctions are denied, as is plaintiffs' motion for class certification.

BACKGROUND

The following are the undisputed facts as taken from the parties' briefs in support of and in opposition to these motions.

The defendant Congregation is a religious corporation organized under the laws of New York and the governing body of the Satmar Hasidim, an orthodox Jewish sect. Prior to 1979, the Congregation was led by its Rebbe or spiritual leader, Rabbi Joel Teitelbaum. Rabbi Teitelbaum died in August 1979 and was succeeded by Rabbi Moshe Teitelbaum. The majority of Satmar Hasidim in this state live in the village of Kiryas Yoel (or Kiryas Joel) in Orange County, New York. The Congregation owns a cemetery in Kiryas Yoel, where the deceased Rebbe is buried along with many of his followers.

Plaintiff Norman Brach is the supporter of a splinter group which refuses to accept the authority of the present Rebbe. This group consists of forty-one families who reside in Kiryas Yoel. After a lengthy controversy, the Congregation expelled this splinter group in February of 1989. Plaintiff Norman Brach is suing in his own capacity and as a representative of this class.

Appendix D

Large numbers of Satmar Hasidim gather at the gravesite of the late Rebbe on the "Yahrzeit," or anniversary of his death. In August 1992 the Congregation banned the plaintiffs from the cemetery on the date of the Yahrzeit, since their activities in previous years had led to disturbances. Plaintiffs allege that the Congregation enlisted the support of the New York State police and the District Attorney of Orange County to remove the plaintiffs from the cemetery. The District Attorney of Orange County and the County of Orange have also been named as defendants in the present action.

On August 21, 1992, four days before the Yahrzeit, members of plaintiffs' group commenced a class action proceeding in state court seeking to prohibit the Congregation from barring members of the class from entering the cemetery on the Yahrzeit. Plaintiff Brach was apparently not a party to that proceeding. On August 24, 1992, the state court denied the petition on the ground that the relief requested required the court to delve into religious questions that were not justiciable in a secular court.

Following the decision in state court, plaintiff Brach filed this action in federal court in his own capacity and as representative of a particular class of Satmar Hasidic Jews. The complaint alleges that the Congregation violated plaintiffs' rights pursuant to 42 U.S.C. §1982 and the New York State Constitution, and that defendants the County of Orange and the Orange County District Attorney's Office violated plaintiffs' rights pursuant to 42 U.S.C. §§1983, 1985, and the New York State Constitution by arresting and prosecuting members of plaintiffs' class who entered the Congregation cemetery. In addition, plaintiffs are also suing the New York Cemetery Board (composed of the New York Secretary of State, the state Attorney General, and the state Commissioner of Health) in an effort to

have section 1401 of New York's Not-for-Profit Corporation Law declared unconstitutional. Section 1401 provides that cemeteries owned by religious corporations are not subject to the administration or supervision of the Cemetery Board.

The Congregation moved to dismiss plaintiffs' complaint for failure to state a claim on which relief may be granted and for lack of subject matter jurisdiction. The Congregation also requested Rule 11 sanctions against plaintiffs for opposing this motion and for court costs. The Congregation argued that the complaint fails to state a cause of action under section 1982, that no property right of plaintiffs has been violated, and that the controversy between the parties is nonjusticiable as it is based on a religious dispute.

On the return date, the Court noted on the record that actions under section 1982 require evidence of discrimination on the basis of race and ethnicity. In addition, the Court also inquired of plaintiffs' counsel why he had not included the Congregation in his section 1983 and 1985 claims against the other defendants. Counsel asked for an opportunity to brief the matter more fully. The Court agreed to allow counsel the opportunity to circulate an amended complaint among the parties and directed the Congregation to show cause why plaintiffs should not be permitted to file the proposed amended complaint.[1] All parties have now complied with the Court's directive, and the matter is now ready for resolution.

---

1. Contrary to the Court's direction, plaintiffs have already filed their proposed amended complaint, rather than hold the matter in abeyance pending a ruling on plaintiff's motion.

Appendix D

DISCUSSION

Section 1982 Claim

42 U.S.C. §1982 states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 1982 is among the older unamended civil rights statutes. Although it was passed in 1866, it has enjoyed a recent renaissance in the context of other laws intended to eliminate discrimination in housing, such as the Fair Housing Act. Section 1982 bars discrimination in the enjoyment of property by both private and public parties, *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and despite its nonneutral language, its proscription against discrimination has been applied to cover whites as well as people of color. At the same time, the statute has been held to cover only discrimination on the basis of race or ethnicity, and not on the basis of religion. *See Catholic War Veterans of the United States v. City of New York*, 576 F. Supp. 71, 74 (S.D.N.Y. 1983) ("[Sections 1981 and 1982] are exclusively directed at discrimination based on race and do not address discrimination based upon religious affiliation."). Although Jews have been held to be covered under section 1982 , *see Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1986), such coverage is premised on their membership in a racial or ethnic category, and not in a religious group. *See Jews for Jesus v. Jewish Comm. Rel. Council of N.Y.*, 968 F.2d 286 (2d Cir. 1992); *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990).

Appendix D

"A plaintiff states a viable cause of action under Section . . . 1982 only by alleging a deprivation of his rights on account of his race, ancestry, or ethnic characteristics." *See Zemsky v. City of New York*, 821 F.2d 148 (2d Cir. 1987). In this case, plaintiffs have failed to state the necessary cause of action. Plaintiffs' complaint only alleges, in Count I, that

> upon information and belief, all deceased Satmar Jews whose remains are interred within the defendant Congregation's Cemetery made financial arrangements with the defendant Congregation (or its predecessor in interest) pursuant to which, for a given consideration, burial of the person furnishing the consideration was to be permitted and facilitated. The right of burial in any Cemetery is an important property right, which inures to the benefit not only to the individual who has arranged for his interment within the Cemetery, but to members of his family and other as well, who desire to pray or worship or otherwise visit the gravesite of a decedent.

The Count ends by stating that these actions "represent a continuing violation of the rights of the plaintiffs and of each member of the Class for whose benefit this action is intended, as provided by 42 U.S.C. §1982." Nowhere in plaintiffs' complaint is there an indication that plaintiff Brach and the class he claims to represent were discriminated against by defendant on the basis of their race or ethnicity.[2]

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2. Plaintiff's only reference to the identity of the group he claims to represent is the statement that the class is composed of Satmar Hasidic Jews, a "distinctive class of Hasidic Jewry."

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Although the section 1982 claim in plaintiff's proposed amended complaint has been somewhat fleshed out, it is again insufficient to provide a colorable claim of a section 1982 violation. The amended complaint states: "Plaintiff alleges . . . that denial of access by a person of Jewish faith to the gravesite of a deceased person by members of his family constitutes the violation of a protected property right within the meaning of 42 U.S.C. §1982."

In their original papers in opposition to the congregation's motion to dismiss, plaintiffs stated that all they asked the Court to do

> on this prediscovery motion to dismiss is to find that the complaint states a claim, *i.e.*, that Yetev Lev's exclusion of mourners from a cemetery is not a protected act and that Yetev Lev is not immune to the authority of the state and federal law and, in particular, that a claim for deprivation of their civil and constitutional liberties will not be defeated merely by the fact that the parties are of the same race or nominally of the same religion.

In a footnote to this paragraph, plaintiffs further added: "For example, if the facts developed through discovery demonstrate that the moving defendant considers the plaintiff class to be of a different race or religion, the nominal sameness would not defeat the claims."

Plaintiffs' understanding of the law is incorrect: Section 1982 simply does not cover religious discrimination.[3] Although

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3. Plaintiff is also incorrect in claiming that if defendant were to view

(Cont'd)

plaintiffs are correct in noting that Jews are covered under section 1982, they are covered as an ethnic and not as a religious group. *See Jews for Jesus*, 968 F.2d at 291 ("Jews have been considered a *race* for purposes of §1982.") (emphasis added). For plaintiff Brach to plead a proper complaint it would be necessary for him to claim in good faith that the splinter group of Satmar Hasidim he hopes to represent was indeed the victim of racial or ethnic discrimination by the defendant. A claim of religious discrimination will simply not suffice.

As plaintiffs' complaint does not allege a fundamental element of a section 1982 claim, plaintiffs' action as against the defendant congregation must be dismissed.

Section 1983 Claim

42 U.S.C. §1983 creates a cause of action against any person who, under color of state law, deprives another of any rights secured by the Constitution or laws. Plaintiffs' section 1983 claim is comprised of two counts. Count One is termed "VIOLATION OF 42 U.S.C. 1983" and simply states:

> The exclusion of plaintiff and the putative class by force and threat of arrest and prosecution at the behest of the Congregation constitutes state action within the meaning of 42 U.S.C. 1983.

(Cont'd)
plaintiffs as a different race this would somehow be sufficient to satisfy the requirements of section 1982. The test for membership in a protected group under section 1982 is not one of subjectivity but of Congressional intent. *See Shaare Tefila*, 481 U.S. at 617 (test is not whether group "[is] considered to be a separate race by today's standards, but whether, at the time §1982 was adopted, [the category] constituted a group of people that Congress intended to protect."); *Jews for Jesus*, 968 F.2d at 291.

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This claim is plainly insufficient to state a cause of action under section 1983. Courts have consistently held that 42 U.S.C. §1983 must be pleaded with particularity. *See Fine v. City of New York*, 529 F.2d 70, 73 (2d Cir. 1975); *Peavey v. Polytechnic Institute of New York*, 775 F. Supp. 75, 77 (E.D.N.Y. 1991). Count One of plaintiff's proposed amended complaint is not only devoid of particularity, it simply states a legal proposition, not a cause of action. Insofar as it does the former, it is also erroneous. The defendant in an action under section 1983 must be either an officer of the state or a private person acting in conspiracy with officers of the state to deprive the plaintiff of a federally protected right. *See Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

Part of plaintiff's complaint is an attempt to turn the Congregation into a public entity by arguing that the Congregation is inextricably intertwined" or 'symbiotically related' with the Village of Kiryas Yoel. The basis for this theory involves allegations that the Congregation used its political influence in the community to elect members of the local school board and that the Rebbe, as head of the Congregation selects all individuals responsible for the conduct of the municipality and tolerates no dissent.

Even were plaintiff's allegations to be true, they do not make the Congregation a political functionary of the state for purposes of this specific claim. The purpose of the "symbiotic relationship" test invoked by plaintiff is to prevent a government agency from escaping liability for state action by delegating an essentially public function to a private party. *See Evans v. Newton*, 382 U.S. 296 (1966). In cases involving suits against ostensibly private institutions such as the Congregation, the plaintiff must show (1) that the alleged deprivation was caused by the exercise of some right or privilege created by the state or

by a person for whom the state is responsible and (2) that the party charged with the deprivation may fairly be said to be a state actor. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). In other words, plaintiff has the burden of showing that "'the state is *responsible* for the specific conduct of which the plaintiff complains' "." *Atkinson v. B. C. C. Associates, Inc.*, 829 F. Supp. 637, 645 (S.D.N.Y. 1993) *(citing Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original)). Plaintiffs in this case have made no claim that the state was responsible for the conduct of the Satmar Congregation. The allegations of close ties between the village and the Congregation, even if true, would have no bearing on plaintiffs' right to enter, the Congregation's private cemetery. Although the fact that a private actor performs specific public functions may mean that he is liable under section 1983 for those functions, the inverse is not true. The Congregation cannot be held liable as a public actor for activities which are entirely private, such as the management of its private cemetery.

Count Two of plaintiffs' proposed amended complaint is entitled "CONSPIRACY TO VIOLATE 42 U.S.C. SECTION 1983," and unlike Count One, it provides particularized allegations of the conduct plaintiffs allege violated their rights. Count Two essentially alleges that the Congregation conspired with Lieutenant O'Donnell of the New York State Police to bar plaintiffs from the cemetery by providing the officer with a list of names whom the Congregation wished excluded and requesting that the police bar them.

Despite their greater particularity, plaintiffs' allegations are still insufficient to make out a claim under section 1983. Furnishing a person's name and description to the police is not a violation of section 1983, regardless of whether it causes the person's arrest. *See Doe v. Smith*, 704 F. Supp. 1177 (S.D.N.Y.

1988); *Newman v. Bloomingdale's,* 543 F. Supp. 1029 (S.D.N.Y. 1982); *McKinney v. George,* 556 F. Supp. 645 (N.D. Ill. 1983); *Gilbert v. Feld,* 788 F. Supp. 854 (E.D. Pa. 1992). Count Two of plaintiffs' proposed amended complaint fails to state how the Congregation violated plaintiffs' rights by providing their name to the police or how the Orange County defendants became parties to the action by their employees performing their duties as police officers. Both activities are plainly legal, since it is defendants who own the title to the cemetery in question and who thus have the right to bar others from its use.

In addition to alleging a symbiotic relationship between the Congregation and the village, the bulk of plaintiffs' brief in response to defendant's motion is spent challenging this last point and attempting to assert two legal theories that would justify a right of access by plaintiffs to the cemetery. Plaintiffs first claim that the Congregation's private cemetery should actually be considered "public" because it is not generally closed to the public and rely on the case of *Marsh v. Alabama,* 326 U.S. 501 (1946), where the Supreme Court upheld the rights of Jehovah's Witnesses to distribute literature on the streets of a company town on the ground that the streets were a public forum since they were open to the general public. Plaintiffs' claim does not withstand serious scrutiny, since the property at issue here cannot lend itself to a *Marsh*-type analysis. Not only did the Supreme Court expressly note in *Marsh* that that was a situation where the owner had opened his property to the public for pecuniary advantage, a central fact not claimed here, but it is obvious that an enclosed private cemetery is different in kind from a town street with all the indicia of public accessibility. Plaintiffs fail to address the implications for their case of *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972), a subsequent case where the Supreme Court significantly narrowed the scope of *Marsh* . In *Tanner,* the Supreme Court

upheld the right of a shopping mall to bar respondents from distributing handbills in public on the ground that, unlike the company town in *Marsh*, the forum did not have "all the attributes" of a municipality. A private cemetery has even fewer such attributes than a shopping mall, which can at least be analogized to a municipal business district. *See also Crist v. Village of Larchmont*, 797 F. Supp. 309 (S.D.N.Y. 1992) (plaintiff properly arrested for trespassing in church after being denied right to address political meeting and refusing to leave); *People v. Leonard*, 477 N.Y.S.2d 111 (1984) (upholding right of state to declare defendant persona non grata on its campuses, although dismissing on ground that trial court improperly shifted burden of proof to defendant); New York Penal Law §140.00(5) (penalizing trespassing on premises open to the public when individual "defies a lawful order not to enter or remain").[4]

As an alternative to their argument, plaintiffs claim that, even if the cemetery is to be considered private, the law should recognize "an easement, a license or a usufruct" whereby heirs to the deceased are permitted to pay their respects to their interred ancestors. The cases cited by plaintiffs do not establish such a right. *Sandoz v. AMI, Inc.*, 33 B.R. 241 (W.D. La. 1983), *A.F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 217 N.Y.S. 413 (Sup. Ct. Saratoga Cty. 1926), and *Warschauer Sick Support Society v. State of New York*, 754 F. Supp. 305 (E.D.N.Y. 1991),

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4. It is also worth remembering that religious organizations have the right to discipline or expel members and that such expulsion is not an actionable tort. *See Paul v. Watchtower Bible and Trust Society of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987), *cert. denied*, 484 U.S. 926 (1988); *Grunwald v. Bornfreund*, 696 F. Supp. 838 (E.D.N.Y. 1988) (upholding right of Hasidic Jewish community to expel members). This right would be rendered empty if it did not carry with it the concomitant right to bar the individual from attending ceremonies or to restrict his or her access to the organization's property.

involve attempts to sell off a portion of the cemetery lands, not any issues of access. *Terry v. Elmwood Cemetery,* 307 F. Supp. 369 (N.D. Ala. 1969) involves the right of a black person to be buried in a public cemetery that was open only to white people, a situation with no relevance to the present action. *Smith v. Gaton Funeral Directors, Inc. v. Dean,* 80 So. 2d 227 (Sup. Ct. Ala. 1955), concerns the right of the heirs of a deceased person to sue the cemetery owner for bulldozing the gravesite of their deceased brother. None of these cases held that the heirs of a deceased person have a right of access to the gravesite or to conduct religious services or any other activity on cemetery grounds. In addition, all of these cases deal with public cemeteries, which offer burial plots for sale to the general public, not with a private cemetery such as this one, which does not offer burial plots for sale and does not allow burial other than as a death benefit to members in good standing. Finally and most importantly, even if plaintiffs had such a right, there is no indication that the Rebbe is a relative of any of the members of the class, and this argument would therefore not afford the class relief.

New York law, the only jurisdiction which should rightfully concern us, provides no differently. Section 84(6) of the Municipal Corporation Law provides that the owner of a cemetery lot and his heirs "shall have in common the possession, care and control of such lot, plot or part thereof." New York courts have interpreted this provision somewhat narrowly, noting that it does not give the holder of the lot property in fee simple absolute but only "(l) a right of interment (2) and the right to erect a suitable monument and care for the plot." *Fromer v. Shientag,* 189 N.Y.S.2d 937, 940-41 (Sup. Ct. N.Y. Cty. 1959). As noted above, the Congregation cemetery is not a public cemetery. It does not offer burial plots for sale, whether to the general public or to its own members, and does not grant property deeds to the

cemetery lots. The statutory provisions are thus inapplicable here. Moreover, as noted above, there are no allegations that the Rebbe is a relative of any of the members of the class.

Section 1985 Claim

Count 3 of plaintiffs' proposed amended complaint is entitled "CONSPIRACY TO VIOLATE 42 U.S.C. SECTION 1985" and alleges that the acts of the Congregation and those in concert with them to deny plaintiffs access to the Kiryas Yoel cemetery constitute a conspiracy to violate 42 U.S.C. §1985 (2) and (3).

Plaintiff have again failed to state a cause of action. Section 1985(2) deals with conspiracies to obstruct justice. No facts are alleged in this case in support of any claim that the defendants conspired to deter any person from appearing or testifying in court or to obstruct court proceedings within the meaning of section 1985(2).

Section 1985(3) prohibits, in pertinent part, conspiracies undertaken "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." A claim under section 1985(3) requires a showing of a conspiracy to violate the plaintiff's constitutional rights based on racial or otherwise class-based, discriminatory animus. *See Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971). This class-based animus has been interpreted to include religion. *See Colombrito v. Kelly*, 764 F.2d 122, 130 (2d Cir. 1985).

As with the other counts discussed above, Count 3 of plaintiffs' proposed amended complaint is poorly pled. The complaint states:

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> **The acts of the defendant Congregation and those individuals hereinabove identified and those acting in concert with them, to deny access to the Kiryas Joel Cemetery to the plaintiff and to the members of the group for whose account this action has been initiated constitute a conspiracy to violate the provisions of 42 U.S.C. Section 1985(2) and (3) in that the plaintiff, and the group of individuals for whose account this action has been filed, are all observant and religious Jews and are entitled under the Constitution of the United States and the laws and Statutes of the United States enacted pursuant thereto to enter upon and to exercise their rights as religious Jews at the burials and at the gravesites of deceased kinsmen, friends and the late Grand Rebbe Joel Teitelbaum.**

Once again, the heart of the count only states a legal proposition, in this case that observant and religious Jews are entitled to enter the Congregation cemetery and that the Constitution and laws of the United States somehow provide them with this right. Nowhere in this count is there an assertion that the plaintiffs were the victims of a "class-based animus" which discriminated against them based on their Judaism. Even if plaintiffs had pled their complaint correctly, the facts as alleged in the complaint and in their briefs contradict such a claim. The plaintiffs admit that the source of their expulsion is their refusal to accept the authority of the present Congregation Rebbe. Accordingly, this is an internal dispute between members of a sect and nothing more. As noted above, religious organizations have the First Amendment right to discipline or expel members. *See Paul,* 819

F.2d at 875; *Grunwald*, 696 F. Supp. at 838. Plaintiffs have provided no case law allowing for the abridgment of this right by means of an action under section 1985. Ruling otherwise would mean that any internal dispute between members of a religious organization could escalate into a civil rights suit for religious discrimination.[5]

Accordingly, defendant's motion to deny plaintiffs leave to file their amended complaint is granted, and plaintiffs' original claim against the Congregation pursuant to 42 U.S.C. §1982 is dismissed. As plaintiffs' claim under 42 U.S.C. §1982 leaves no independent basis for jurisdiction, the dismissal of plaintiffs' pendent state law claim pursuant to the New York State Constitution is also appropriate. The parties' cross-motions for sanctions are both denied on the ground that they have failed to comply with the amended Rule 11 requirement that a motion for sanctions "be made separately from other motions or requests." As plaintiffs' complaint is dismissed, plaintiffs' motion for class certification is also denied as moot.

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5. It is worth noting that defendants have provided an alternative ground on which to dismiss this case, which is urged by defendant. Case law exists for the proposition that actions where religious disputes lie at their center are nonjusticiable and properly dismissed for lack of subject matter jurisdiction. *See, e.g., Congregation Beth Yitzhok v. Brisiman*, 566 F. Supp. 555 (E.D.N.Y. 1983) (no justifiable controversy where court would have to apply doctrine to determine who was heir to religious title). The related state court proceeding originally brought on state law grounds by other similarly situated plaintiffs to enforce their right to pray at the cemetery was dismissed for precisely this reason. *See Weinstock v. Congregation Yetev Lev D'Satmar, No.* 5798-92 (Sup. Ct. Orange Cty. Aug. 24, 1992) ("To [give plaintiff access to the cemetery] would require the Court to delve deeply and without authority into the religious difference of the two groups and then decide who was correct and who should be permitted to reverence [sic] Rabbi Teitelbaum. This is beyond the Court's authority."). Since plaintiffs' claims are dismissed for failure to state a claim, it is unnecessary to reach this issue.

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The Clerk is directed to enter judgment dismissing the within action and to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
September 9, 1993

s/ Charles P. Sifton
United States District Judge

APPENDIX E — LETTER OF THE AMERICAN JEWISH COMMITTEE DATED DECEMBER 6, 1995

The American Jewish Committee

The Jacob Blaustein Building
165 East 56 Street
New York NY 10022-2748
(212) 751-4000

Robert S. Rifkind
President

David A. Harris
Executive Director

December 6, 1995

Noel W. Hauser, Esq.
Noel W. Hauser and Associates
415 Madison Avenue
New York, NY 10017

Re: ***Brach v. Congregation Yetev Lev D'Satmar, Inc.***

Dear Mr. Hauser:

Thank you very much for inviting our attention to the decision in the above-captioned case by United States District Judge Charles Sifton, as well as the Order affirming this decision by the United States Court of Appeals for the Second Circuit. The ruling is that individuals who follow the Orthodox teaching of the Jewish faith can be barred from entering a cemetery to pray at the graves of deceased persons, including their immediate ancestors buried within the cemetery, because the cemetery is privately owned.

Appendix E

We understand that you are applying for a Writ of Certiorari to the United States Supreme Court seeking review of this decision. The Court should be advised that graveside prayer several times a year by the near relatives of deceased persons is an important ritual followed by members of the Jewish faith throughout the world, and that refusal of access for this purpose by a cemetery "owner" whose property has been used for interment of the dead represents a serious incursion on the religious obligations of members of the Jewish faith.

While religious tradition or observance by members of other faiths may not compel the offering of graveside prayer by the next of kin, it cannot be denied that since the dawn of civilization, people of every religious faith, as well as people without any religious faith, have buried their dead in marked graves in order to be able to return to those graves for prayer and meditation.

For this reason, the decision by the lower courts in the *Brach* case far transcends the interests of the people immediately affected and, therefore, merits review by the Supreme Court.

You are authorized by our organization to include this letter in your Petition for Certiorari to the United States Supreme Court.

Yours truly,

s/ Samuel Rabinove
Samuel Rabinove
Legal Director

SR:sb
pl nwhauser.sr

APPENDIX F — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV of the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 provides:

> **(1) Preventing officer from performing duties**
>
> If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
>
> **(2) Obstructing justice; intimidating party, witness, or juror**
>
> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from

attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or

hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.